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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1948~~ 1951

No. ~~104~~ 1

GEORGIA RAILROAD & BANKING CO.,

*Appellant,*

*vs.*

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

EUGENE COOK,

*Attorney General of Georgia;*

M. H. BLACKSHEAR, JR.,

*Assistant Attorney General of Georgia,*

*Counsel for Appellee.*

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1949**

**No. 454**

**GEORGIA RAILROAD & BANKING CO.,**

*Appellant,*

*vs.*

**CHARLES D. REDWINE, STATE REVENUE COMMISSIONER**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF GEORGIA**

**MOTION TO DISMISS THE APPEAL AND AFFIRM  
THE JUDGMENT OF THE COURT BELOW**

The appellee, believing that the matters set forth below will demonstrate the lack of substance in the questions raised by this appeal, files this his motion to dismiss the appeal and to affirm the judgment of the District Court on the ground that the questions raised on behalf of appellants are so unsubstantial as not to require further argument.

While the cause is one which would otherwise be reviewable by the Supreme Court on direct appeal from the District Court, appellee asserts that the unsubstantial character of the grounds stated by appellant is so apparent on the face of the record as to warrant the Court in summarily disposing of the appeal at this stage of the proceeding.

The matters here relied upon by appellee are more particularly stated as follows:

## 1

The face of the record, especially the opinion of the majority of the Court, shows clearly that the action dismissed is one against the State of Georgia to which the State has not given its consent to be sued, and hence the District Court for the Northern District of Georgia had no jurisdiction over the case.

## 2

The record shows that the case of *Musgrove v. Georgia Railroad & Banking Company*, 204 Ga. 139, 49 S. E. 2d, 26, appealed to the United States Supreme Court and appeal dismissed at the last term of the Supreme Court, *Georgia Railroad & Banking Co. v. Musgrove*, 335 U. S. 900, in which the identical issues were determined as are raised in the case at Bar, is *res judicata* as to all the issues raised in this case. The record shows that plaintiff, completely ignoring the judgment now sought to be enforced, deliberately went into the courts of the State of Georgia and sought another judgment on almost identical allegations as were brought on the District Court below in the case at Bar. The Supreme Court of Georgia having thus determined the issues adversely to the Georgia Railroad & Banking Company, and its decision having been affirmed by the Supreme Court of the United States, this present appeal in a case attempting to raise again the identical issues should be dismissed as being barred by the doctrine of *res judicata*. This decision in the Supreme Court of Georgia, being the latest of two conflicting decisions on the same question, supervenes the judgment herein sought to be enforced: hence, the present appeal is too unsubstantial to require further argument and consideration by the



Court. (See authorities cited on this question in the majority opinion of the Court below.)

The Court below correctly dismissed the action because of lack of jurisdiction to grant the relief prayed, because, as set forth in the answer and motion to dismiss the petition in the Court below, the appellant has ample remedies in the courts of Georgia to resist the collection of the taxes if it has any right to an exemption.

*U. S. C. A.*, 28-1341 (1948):

"The District Court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under the State law where a speedy and efficient remedy may be had in the courts of such State."

The request of defendant for admission under Rule 36 not answered or denied by plaintiff, shows that even had there been a valid contract between the State of Georgia and the Georgia Railroad & Banking Company whereby perpetual tax exemption was granted as claimed by plaintiff, the Georgia Railroad & Banking Company violated the terms of said contract by failing to construct the lines of railroad provided by the charter. Hence, it follows that the Federal Constitution does not protect a contract which plaintiff has itself violated by failing to perform the terms thereof.

*Bacon v. Texas*, 163 U. S. 207;

*State v. Morgan*, 28 La. 490;

*Pennsylvania College Cases*, 80 U. S. 190;

*Town of Henckley v. Kettle River Railroad Co.*, 70 Minn. 105;

*Ravenswood S. & G. Railway Co. v. Town of Ravenswood*, 41 W. Va. 732, 24 S. E. 597;

*Long Island Water Supply Co. v. City of Brooklyn*, 17 S. Ct. 722.

In the latter case, the Court says:

" . . . A charter is not simply an executed grant, but a continuing contract. There is a duty of performance by the recipients of the grant which continues during the life of the charter."

The appeal should be dismissed because the 14th Amendment to the Federal Constitution guarantees the equal protection of the laws to every citizen. And, if an iniquitous tax exemption denies the equal protection of the laws, the people of the State of Georgia may exercise their right to obtain this equal protection of the law by adopting the Constitution which repeals perpetual tax exemption. In adopting the Constitution of 1945 the people of Georgia took this step to provide the equal protection of the laws guaranteed by the 14th Amendment, this Amendment being of later date and thus superior to any provision of the original Constitution which conflicts with its provisions, such as the protection of a contract which of itself is a denial of the equal protection of the law.

WHEREFORE, appellee respectfully submits this statement showing that the questions upon which the decision of this cause depends are so unsubstantial as not to require further argument, and appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment of dismissal entered in the Court below.

EUGENE COOK,

*The Attorney General;*

M. H. BLACKSHEAR, JR.,

*Assistant Attorney General.*